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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
MAGI, INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-132

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of the terms of a Washington Department of Ecology wastewater treatment enforcement order, came on for hearing before the Pollution Control Hearings Board; Lawrence J. Faulk, Wick Dufford and Gayle Rothrock (presiding) at Wenatchee, Washington, on November 18, 1985. Respondent agency elected a formal hearing pursuant to RCW 43.21B.230. Joan Steichen, official court reporter, recorded the proceedings.

Appellant company appeared and was represented by its general manager, George J. Chapman. Respondent agency appeared and was

1 represented by Assistant Attorney General Allen T. Miller, Jr.

2 Witnesses were sworn and testified. Exhibits were admitted and
3 examined. Argument was heard. From the testimony, evidence, and
4 contentions of the parties, the Board makes these

5 FINDINGS OF FACT

6 I

7 Appellant company is a member-owned fruit storage, packaging, and
8 sales corporation in north central Washington with plant facilities in
9 Omak and Brewster. One-hundred and forty producer-growers associated
10 with Omak Fruit Company, Brewster Co-op Growers, and Mutual Apple
11 Growers are owners of this medium-sized modern fruit company which
12 experienced \$15 million in gross sales in a recent year. One hundred
13 twenty-five people are employed by MAGI, Inc., whose sales reach all
14 states and overseas. Apples are its pre-eminent product.

15 II

16 MAGI drenches the fruit it receives each autumn at its facilities
17 with a chemical which inhibits fruit respiration and mold damage. The
18 fruit, resting in plywood boxes, gets a quick drenching of water and
19 diphenylamin (DPA drencher) in operations which normally are underway
20 about three weeks in any particular year at the Omak facility. In
21 drainage, this drencher and all other liquid run-off finds its way out
22 of the facility and into an unlined 35-foot by 10-foot evaporation
23 lagoon of unknown depth. The adjacent roadway run-off also drains
24 into that lagoon. There is somewhere between 600 and 1,000 gallons of
25 fluid in the lagoon at the time of fall run-off.

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1 III

2 Bioassays have shown that DPA is highly toxic, killing coho salmon
3 in extremely small concentrations.

4 IV

5 During the winter months the MAGI Omak plant is operating a
6 coolant system in the non-contact refrigeration unit. There is a high
7 volume cooling water discharge to the outside grounds which has some
8 amount of sodium ortho phenolphenate in it. The company has not been
9 able to recycle that water to date because of the heat the water
10 acquires in process.

11 From mid-April through August operations are very quiet at the
12 Omak facility and water use is only for maintenance and domestic
13 supply purposes.

14 V

15 The Washington State Department of Ecology (WDOE) is the state
16 agency chiefly empowered to implement the Clean Water Act, which Act
17 protects surface and ground waters in this state. Those duties extend
18 to investigating and monitoring waste water discharge and issuing
19 appropriate permits for municipalities and industries.

20 Under that authority WDOE issued a five-year State Waste Discharge
21 Permit (No. 5587) to MAGI, Inc., on June 15, 1981, which permit
22 imposed a daily maximum waste water discharge (all sources) of 900
23 gallons. The DPA drencher effluent was limited to a daily average of
24 200 gallons and a daily maximum of 400 gallons. Some wastewater
25 monitoring conditions, restrictions on toxic and non-toxic waste

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1 disposal, and admonitions to repair and report out-of-compliance
2 circumstances are contained in the permit. The permit conditions
3 remonstrate that any changes planned in the plant operations which
4 would generate additional waste water must be submitted to WDOE in
5 order that permit No. 5587 be modified or a new permit be issued.

6 VI

7 Through an environmental review process the City of Omak notified
8 WDOE in August of 1984 of MAGI's proposed modification of its fruit
9 treatment station at the east Omak plant. MAGI notified the City it
10 was switching to a drive-through DPA drencher system to improve
11 effectiveness. WDOE construed this at first as an expansion of use
12 probably generating more wastewater and an appointment was made to
13 visit with MAGI's general manager about the proposed development.

14 VII

15 As a result of a September 1984 meeting WDOE affirmed their
16 understanding that during picking season 200 gallons per day of DPA
17 drencher discharge goes out to the unlined evaporation lagoon (pond).
18 There are typically only seven to ten drencher wastewater discharges
19 within a three-week period in the autumn.

20 In the letter reviewing that meeting WDOE additionally stated that
21 due to other unrelated ground water quality problems in the area, MAGI
22 was asked to develop plans to construct a lined pond to accept all
23 liquid wastes from the DPA (drencher) facility. The idea was that the
24 wastes would evaporate during the off-picking season, that none would
25 get into the ground water. WDOE indicated a completed pond should be

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1 in place by the 1985 picking season and enclosed application blanks
2 for MAGI submittals commensurate with a modification of waste
3 discharge permit No. 5587.

4 VIII

5 Hearing nothing from MAGI by Mid-April of 1985 WDOE's
6 environmental quality specialist again wrote MAGI's general manager
7 reminding him a lined pond or other approved facility needed to be in
8 place by the autumn picking season.

9 IX

10 The WDOE shortly thereafter reviewed City of Omak water records
11 for a 15-month period (January 1984 - March 1985), and ascertained
12 several months where the water consumption at the east Omak facility
13 at least tripled the 900 gallons per day maximum discharge limit in
14 the permit. The WDOE determined that with this surprisingly high
15 consumption rate the wastewater discharge rate must be equally high,
16 given the Laws of Nature.

17 Thus both the amount and the the nature of wastewater discharge
18 became matters of concern to the state agency.

19 X

20 No further communication from MAGI came forth by July 1. WDOE
21 thereupon issued a regulatory order, DE 85--465, dated July 5, 1985,
22 charging violations of State Waste Discharge Permit No. 5587 and the
23 Clean Water Act and requiring the company to take these actions:

- 24 1. Cease and desist from the discharge of all
25 contaminated process waste water until such time
26 as a new industrial waste discharge permit is
issued under the provisions of chapter 90.48 RCW.

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II

RCW 90.48.160 provides in pertinent part:

Any person who conducts a commercial or industrial operation of any type which results in the disposal of solid or liquid waste material into the waters of this state, ...shall procure a permit from...the Department...before disposing of such waste material....

III

In implementing the permit requirement, WDOE promulgated regulations on permit changes or terminations and entered them formally into the Washington Administrative Code (WAC).

WAC 173-216-130 provides:

1. Any permit issued under this chapter can be modified, suspended, or revoked in whole or in part by the Department for the following causes:
 - a. Violation of any permit, term, or condition;
 - b. Obtaining a permit by misrepresentation or failure to fully disclose all relevant facts;
 - c. A material change in quantity or type of waste disposal; or
 - d. A material change in the condition of the waters of the state.

These laws make clear that WDOE may require modification of a permit when any of the four "causes" occur. Here the agency documented volumetric water discharges at times exceeding permit limits. Further, undisputed information led them to suspect ground water quality problems in the area from other sources. However, the fear that modifications in the DPA drencher would result in an increase in disposal of this contaminant proved to be unfounded.

IV

Under these circumstances, the requirement that MAGI's permit be modified was within WAC 173-216-130. Moreover the action required, to design and install a lined pond, appears "appropriate." RCW 90.48.120(2).

When ground water and soils in an area are ascertained to be more vulnerable than historically was the case, any discharger needs to take extra precautions not to contribute additional toxics or organic compounds to the soils and ground water.

V

The high water use at the east Omak plant, which is both greatly in excess of the permit and very expensive to the MAGI owners and operators, went undetected and unacknowledged for a long period of time.

However, the high volumetric water consumption was not shown to have any connection with increased ground water contamination or the immediate potential thereof. Therefore, we conclude that the requirement to cease and desist from further discharges of contaminated process waste water was not "appropriate."

VI

Any Finding of Fact which deemed a Conclusion of Law is hereby adopted as such.

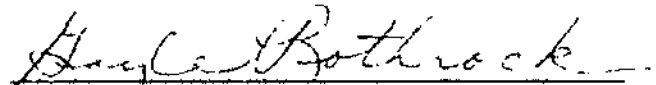
From these Conclusions of Law the Board enters this

ORDER

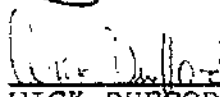
Regulatory Order DE 85-465 is affirmed except for numbered paragraph 1. which is reversed. The schedule for plans, specifications and construction should be reasonably adjusted by WDOE.

DONE this 31st day of January, 1986.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Vice Chairman


LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member